No. 15387

In the United States Court of Appeals for the Ninth Circuit

JO EISINGER AND LORAIN B. EISINGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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INDEX

CITATIONS

Cases:

Cases—Continued Page

Statutes:

Miscellaneous:

Miscellaneous—Continued Page

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 41-45) is not officially reported.

JURISDICTION

This petition for review (R. 53-55) involves deficiencies in federal income taxes for the calendar years 1949 and 1950 in the respective amounts of $2,458.22 and $925.76 (R. 45-49). A notice of deficiency was mailed to the taxpayers on January 29, 1953. (R. 12-18.) Within ninety days thereafter and on April 17, 1953, the taxpayers filed a petition for redetermination of those deficiencies under the

provisions of Section 272(a) of the Internal Revenue Code of 1939. (R. 3, 5-33.) The decision of the Tax Court was entered on June 13, 1956. (R. 52.) By an order of the Tax Court dated October 12, 1956, the taxpayers were granted an extension of time to December 9, 1956, for filing the record on review and docketing the petition for review. (R. 57.) The case is brought to this Court by a petition for review filed by the taxpayers [1] on September 10, 1956. (R. 53-55.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

The taxpayer was divorced from his first wife, Wilhelmine, by a decree of a local court of the State of Florida in 1949. At that time they were the parents of two minor sons. The decree of divorce incorporated in it a property settlement agreement between the taxpayer and Wilhelmine. Under the agreement the taxpayer was to pay Wilhelmine $125 a week but (1) as each child reached the age of twenty-one the $125 weekly payments were to be reduced by $31.25, (2) if either child died before he reached his majority, the $125 weekly payments were to be reduced by $31.25, (3) if both children died before reaching their majority, Wilhelmine was to receive $62.50 a week, (4) when both children reached the age of twenty-one, Wilhelmine was to receive only

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[1] Since Lorain B. Eisinger, the present wife of Jo Eisinger, is involved solely because of the filing of joint returns for the taxable years, her husband hereinafter will be referred to, individually, as the taxpayer.

$62.50 a week, (5) if Wilhelmine remarried, "alimony" payments were to cease and in lieu thereof the taxpayer was to pay $31.25 a week for the support of each child, and (6) if Wilhelmine failed to support the two children, the taxpayer had the right to pay the cost thereof and deduct it from the $125 weekly payments.

The question is whether the Tax Court correctly held that, on these facts, an amount of the payments made by the taxpayer to his former wife ($62.50 of the $125 weekly payments) was specified as a sum which was payable for the support of the taxpayer's minor children and, therefore, that amounts so specified were not deductible by the taxpayer as amounts expended for the support of his former wife under the provisions of Sections 23(u) and 22(k) of the 1939 Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * *

(k) [As added by Sec. 120(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or

incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(u) [As added by Sec. 120(b), Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(a) *In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).

* * * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. * * *

Sec. 29.23(u)-1. *Periodic Alimony Payments.*—A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22(k)-1. (For definition of husband and wife in such cases, see section 3797(a)(17).)

* * * *

STATEMENT

The facts as stipulated (R. 35-40) and as found by the Tax Court (R. 41-44) may be summarized as follows:

The taxpayer filed joint returns with his second wife, Lorain, for 1949 and 1950, the taxable years involved, with the Collector of Internal Revenue for the Sixth District of California, at Los Angeles. (R. 41.)

Pursuant to a decree granted May 26, 1949, by the Circuit Court of Dade County, Florida, the marriage of the taxpayer to Wilhelmine Eisinger was dissolved. At that time they were the parents of two minor sons, Carl and Lloyd, sixteen and ten years of age, respectively. (R. 42.)

A written property settlement agreement dated March 28, 1949, and modified on May 19, 1949, was incorporated in the decree of divorce. (R. 42.) The agreement read, in pertinent part, as follows (R. 42-43):

> 4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida, and in and for Dade County, in Chancery, No. 112550-C, and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said

weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week, during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 Dollars ($62.50) per week.

* * * *

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. * * *

The Commissioner disallowed the sum of $1,925 in 1949 and the sum of $3,364.50 in 1950 of the total amounts claimed as deductions for alimony payments by the taxpayer on the ground that such amounts were paid for the support of his minor children. (R. 43-44.)

The Tax Court, by its opinion, upheld the action of the Commissioner. (R. 41-45.)

A review of the matter thus presented is sought by the taxpayer before this Court. (R. 54-55.)

SUMMARY OF ARGUMENT

In reaching its conclusion that the agreement between the taxpayer and his former wife, Wilhelmine, fixed a portion of the periodic payments ($62.50 of the $125 weekly payments) as sums payable for the support of their minor children, the Tax Court properly construed the agreement as a whole. So read, the agreement throughout evidences a separation between the taxpayer's obligations to his former wife and those to his children. Thus, the agreement reduces the periodic payments by a *fixed* sum ($62.50) when the wife remarries, continuing the payments for the support of the children ($62.50) thereafter; it reduces the payments, by a fixed sum ($62.50), whether or not the wife remarries, when it becomes

no longer necessary to support the children (*viz.*, upon their death) or when the taxpayer no longer would be under an obligation to support his children (*viz.*, when they reach their majorities), in which latter two events the reduction in payments is made without reference to the needs of the wife. Moreover, in each one of these circumstances the agreement fixes the portion of the $125 weekly payments for wife support at $62.50.

On these facts, Sections 23(u) and 22(k) of the 1939 Code, and the cases which have construed them, deny to the husband (the taxpayer here) a deduction for the sums allocable to the support of his children as distinct from the sum fixed for the support of the wife. Accordingly, the Tax Court correctly denied the taxpayer the right to deduct $62.50 of the $125 weekly payments made under the agreement in question.

ARGUMENT

The Tax Court Correctly Held That the Sum of $62.50 A Week Was Fixed By the Property Settlement Agreement As Payable for the Support of the Taxpayer's Minor Sons and, Therefore, Not Allowable As a Deduction Under Section 23(u) of the Internal Revenue Code of 1939

Section 23(u) of the Internal Revenue Code of 1939, *supra*, provides that a husband who is divorced or legally separated from his wife may deduct, in computing his net income, payments made by him to his wife which are includible in her gross income under Section 22(k). Generally, Section 22 (k) of the 1939 Code, *supra*, provides that a wife

who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance shall include in her gross income periodic payments received subsequent to such decree. And, in requiring the inclusion of periodic payments of alimony in her gross income, Section 22(k) provides that:

> This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband.

The clear purpose of Sections 23(u) and 22(k) was to relieve the husband of tax only on that portion of a periodic payment which was not designated or identified in the divorce decree or written instrument incident thereto as destined for support of his minor children. In this connection, it must be kept in mind that the provisions in question were relief measures only to the limited extent of periodic *alimony* payments. The general intention was to tax the wife on the amount of money given to her for her support and, to that extent, permit deduction thereof by the husband. Therefore, where, from the divorce decree or written instrument incident thereto, an amount can be ascertained as allocable to the support of children, the wife is not required to include in her gross income those amounts not received by her for her support. *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Budd* v. *Commissioner*, 177 F. 2d 198 (C.A. 6th); *Joslyn* v. *Commissioner*,

230 F. 2d 871, 879 (C.A. 7th); *Morsman* v. *Commissioner*, 27 T. C. 520; *Gantz* v. *Commissioner*, 23 T. C. 576; *Fleming* v. *Commissioner*, 14 T. C. 1308; *Leslie* v. *Commissioner*, 10 T. C. 807; *Fisher* v. *Commissioner*, decided April 30, 1956 (1956 P-H T. C. Memorandum Decisions, par. 56,098); *Ball* v. *Commissioner*, decided April 13, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55,084); *Neuwahl* v. *Commissioner*, decided July 21, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,206); *Mackay* v. *Commissioner*, decided January 26, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,032); *Hicks* v. *Commissioner*, decided June 19, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,216); *Swallen* v. *Commissioner*, decided May 22, 1951 (1951 P-H T. C. Memorandum Decisions, par. 51,149); Treasury Regulations 111, Section 29.23(u)-1, *supra;* H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 71-72, 73-74 (1942-2 Cum. Bull. 372, 409, 429); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-87 (1942-2 Cum. Bull. 504, 568-570).

In accordance with the stated Congressional purpose, it is held that, in identifying the portion of periodic payments allocable to the support of minor children, it is proper to consider provisions for a reduction in payments to the wife in the case of the death of a minor child, in case of a minor child reaching his majority, and in case of the remarriage of the wife. To be sure, one such provision indicating an amount destined for support of a child may be overcome by other provisions found in the same instrument—since, in the final analysis, the question

is merely whether under the agreement a specific amount is identified as *payable* for the support of children, and, in deciding this issue, the instrument involved must be read as a whole, a single sentence, phrase, or word not being decisive. *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Budd* v. *Commissioner*, 7 T. C. 413, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th); *Weil* v. *Commissioner*, 240 F. 2d 584 (C.A. 2d), certiorari denied, May 13, 1957; *Joslyn* v. *Commissioner*, *supra; Morsman* v. *Commissioner*, *supra; Gantz* v. *Commissioner*, *supra; Fleming* v. *Commissioner*, *supra; Leslie* v. *Commissioner*, *supra; Fisher* v. *Commissioner*, *supra; Ball* v. *Commissioner*, *supra; Neuwahl* v. *Commissioner*, *supra; Mackay* v. *Commissioner*, *supra; Hicks* v. *Commissioner*, *supra; Swallen* v. *Commissioner*, *supra.*

In the present case the pertinent portions of the agreement under inquiry are found in paragraphs 4 and 6 (a). (R. 28-29, 42-43.)

Paragraph 4 of the agreement begins with the following general provision (R. 28, 42): "The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week * * *." The taxpayer appears to contend (Br. 21-22, 28-29, 31) that it is this provision that is decisive in answering the question here involved. He asserts (Br. 21-22) that "Alimony is defined as an allowance made for the support of the wife". With this latter proposition we entirely agree, and it is, of course, obvious that the provision quoted does not specify what portion of the payments was intended for the children's support. But in the same

paragraph (4) the parties give their own meaning to the term "alimony".[2] (R. 28-29.) And, under the principles of construction here applicable (i. e., that we must look to the whole instrument, and the familiar doctrine of *ejusdem generis*) it is made clear that the sum of $62.50 per week was intended by the parties as an amount payable for the support of the children as distinct from the amount payable for the support of the wife, and therefore not deductible by the taxpayer.

The agreement provides (R. 28) that upon the remarriage of the wife the "alimony" payments to her shall cease but, in lieu thereof, the taxpayer shall pay the sum of $31.25 per week for the support and maintenance of each child of their marriage until he reaches the age of twenty-one years. The same paragraph (4) (R. 29) provides that whether or not the wife remarries, as each child shall attain the age of twenty-one the "aforesaid alimony" shall be reduced by $31.25. It is further provided that the payments shall be reduced by $31.25 per week on the death of either child before he reaches the age of twenty-one; if both children die before reaching that age, the taxpayer was to pay the wife only $62.50 per week. (R. 29.)

The provisions discussed provide for two situations: (1) they cut off the wife's share of support ($62.50 a week) upon her remarriage, continuing

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[2] Even under local law the use of the word "alimony" in an agreement is not conclusive, and the agreement must be considered as a whole to determine the true nature of the payments. *Fox* v. *Fox,* 42 Cal. 2d 49, 53, 265 P. 2d 881, 883.

the payments for the children's support and maintenance ($62.50 a week); and (2) they cut off the portion allocated to the support of the children ($62.50) under circumstances where it becomes no longer necessary to support them. Although we submit that the provisions thus far discussed clearly justify the Tax Court's conclusion that $62.50 of the $125 weekly payments was allocated for the support of the children, if there could be any doubt of this the following provisions should settle the matter (R. 29):

> It is the *intention of the parties* that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week during her life and until her remarriage; * * *. [Italics supplied.]

Thus, at a time when the taxpayer would no longer be under a legal duty to support the children, payments to the wife would be reduced by $62.50. And, in paragraph 6(a) it is provided that (R. 23):

> The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage.

If the $125 weekly payments were, as the taxpayer contends (Br. 21-22, 27), for the support of the wife only, and the support of the children was left to her indulgence, then the provisions for fixed reduction in payments, as it becomes no longer necessary to support the children and when the taxpayer would no

longer be under a duty to support them, become completely meaningless. Moreover, it may be well to point out that at the time of the agreement in 1949 the children were sixteen and ten years of age, respectively (R. 42), and if the parties intended $125 weekly as wife support, then we have the anomalous situation of having the amount of the wife's support reduced by the total amount of $62.50 weekly eleven years hence (at the time the younger child reaches his majority) when it is reasonable to assume that the wife would have the most need for payments for her support. The payments are thus lowered without reference to the wife's needs, but geared solely by changed facts in the life of each child; and, it is settled law that a wife's right to support is not dependent upon the children's right to support from the husband. II Vernier, American Family Laws (1932), Section 105; *Bernard* v. *Bernard*, 79 Cal. App. 2d 353, 179 P. 2d 625. The only answer is that the taxpayer is incorrect in asserting that the agreement does not fix $62.50 a week as payable for the support of the children for, indeed, it does actually fix $62.50 a week as payable for their support.

Moreover, in the light of the provisions thus far discussed, that part of paragraph 4 of the agreement which gives the taxpayer the right to pay directly for the support of the children, in lieu of giving the wife the sum fixed for child support (R. 28), takes on significant meaning. This provision simply means that if the wife does not, as agreed, devote $62.50 of the weekly payments to the support of the children, then the taxpayer has the right to pay her

only the amount for her support, or $62.50 a week. The taxpayer's suggestion (Br. 21, 28), that the portion of the agreement now discussed gave the taxpayer the right to deduct all his actual costs of child support from the weekly payments to the wife, seems without foundation when we read the provision in context, as we must. Furthermore, it is inconceivable that the taxpayer could defeat all payments to the wife—that is, under his interpretation, if he underwent costs of $125 a week in supporting the children, the wife would be entitled to nothing. It is a settled proposition that a court will not read such forfeiture into a contract—especially so here where the parties, in the same provision, have fixed the "cost" of child support at $31.25 a week for each child, and fixed the support of the wife at $62.50 a week. *Ballard* v. *MacCallum*, 15 Cal. 2d 439, 444, 101 P. 2d 692, 695; *New Liverpool Salt Co.* v. *Western Salt Co.*, 151 Cal. 479, 485, 91 Pac. 152, 154; *Flagg* v. *Andrew Williams Stores, Inc.*, 127 Cal. App. 2d 165, 176, 273 P. 2d 294, 301; *Retsloff* v. *Smith*, 79 Cal. App. 443, 453, 249 Pac. 886, 889.

Indeed, the taxpayer concedes (Br. 30) that if we look to the instrument as a whole, "a permissible inference may be drawn * * * that the parties had in mind that the support of each child would amount to $31.25 per week." [3] But he argues (Br. 29, 37) that

[3] The taxpayer contends (Br. 30), however, that this is not the only inference to be drawn. But this contention must be examined in the light of the now familiar rule that an income tax deduction is a matter of legislative grace and that the taxpayer had the burden of clearly establishing his

the majority of the provisions discussed should be ignored because the wife had not remarried and the children had not died or reached twenty-one years of age. However, this is not the test; rather, the test is the meaning of the parties as ascertained from the whole instrument. Indeed, this is the test which the cases uniformly apply, including *Weil* v. *Commissioner*, 240 F. 2d 584, 588 (C.A. 2d), certiorari denied, May 13, 1957, much relied upon by the taxpayer throughout his brief.

The gist of the taxpayer's entire argument is that a husband's right to deduct periodic alimony payments under Section 23(u) of the 1939 Code is dependent upon his right, found in the decree of divorce or written agreement incident thereto, to control expenditures of the sum allocable to the support of his children.[4] It is apparently alleged (Br. 19-20, 22, 28, 30) that here the wife had full beneficial ownership of the entire periodic payments; hence the husband had no such control and is entitled to deduct the entire sum paid (Br. 22, 28).

However, when we read the statute and its legislative history, we find nothing that suggests such requirement. The Congressional reports merely talk in terms of a "sum payable for the support of minor children". H. Rep. No. 2333, 77th Cong., 2d Sess.,

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right to the claimed deduction, which he failed to do. *Interstate Transit Lines* v. *Commissioner*, 319 U. S. 590.

[4] In this case the agreement would satisfy such a test since the taxpayer retained the right to stop payments for child support and see to the children's support directly. See discussion, *infra*.

pp. 73-74 (1942-2 Cum. Bull. 372, 429); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 86 (1942-2 Cum. Bull. 504, 570). Moreover, one would search long and hard to discover a decree of divorce or separate maintenance which gives the husband control of the expenditure of amounts allocable to child support when the children live with the wife. A common provision is one directing the husband to pay a sum of money to the wife, and where the wife is given the custody and care of the children of the marriage, there is a designation for child support. Congress must be taken to have spoken with reference to the ordinary situation, and not to the exceptional situation to which no reference is made in its Committee reports, nor, indeed, in the statutory provisions themselves. Furthermore, in *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th), and *Budd* v. *Commissioner*, 7 T.C. 413, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th), and in every case cited *supra* in which amounts were held allocable to child support,[5] the wife was

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[5] Those cases cited by the taxpayer (Br. 32-37) reaching a different result are merely an illustration of the application of the principle we contend for. Each one is wholly distinguishable from the present case and lends conclusive support to the decision rendered by the Tax Court here. Thus, in *Moitoret* v. *Commissioner*, 7 T. C. 640, and *Seltzer* v. *Commissioner*, 22 T. C. 203, there was nowhere any indication as to how much money was intended for the support of the children. In his reference to the *Seltzer* case (Br. 32), the taxpayer directs this Court's attention to the fact that the agreement there provided that upon the remarriage of the wife the husband was to pay $90 per month rather than $120 per month to the wife. The taxpayer fails to point out, however, that the Tax Court there

given "control" of funds paid to her, at least to the extent that "control" was given here,[6] but that fact

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specifically pointed out (p. 208) that that provision was made applicable *only* if the parties were divorced in a jurisdiction other than New York; since they were divorced in New York it never became effective. In *Newcombe* v. *Commissioner*, decided February 19, 1951 (1951 P-H T. C. Memorandum Decisions, par. 51,045), affirmed on another point, 203 F. 2d 128 (C.A. 9th), the parties specifically agreed that the husband should pay $100 a month for the support of the children, *but not until* the wife remarried during the nine years subsequent to the agreement; therefore, the agreement affirmatively negatived any payment for child support, in the only provision fixing an amount for such support, until the occurrence of the stated contingency. In *Chapin* v. *Commissioner*, decided July 28, 1947 (1947 P-H T. C. Memorandum Decisions, par. 47, 224), the wife contended that the entire amount of the $6,000 yearly payments made to her was for the support of the children. Although the agreement fixed a sum for the support of the children upon her remarriage, the Tax Court held that until she remarried some part of it was for her support, and, there being no mention of any amounts payable for her support if she did not remarry, there was no basis for determining what part of it was so used, and it therefore taxed the whole amount to her.

[6] For example, in *Mandel* v. *Commissioner*, decided May 6, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,105), affirmed, 185 F. 2d 50 (C.A. 7th), the wife was given $18,000 a year, obligating herself to provide reasonable support for the children; in *Budd* v. *Commissioner*, 7 T. C. 413, 414, affirmed *per curiam*, 177 F. 2d 198 (C.A. 6th), the husband agreed to pay the wife $500 a month "for her support and/or alimony" and the support of the child; in *Neuwahl* v. *Commissioner*, decided July 21, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,206), the wife was given $500 a month, from which payments she agreed to support the minor children; and in *Morsman* v. *Commissioner*, 27 T. C. 520, the agreement provided that the husband would pay the wife certain sums so that she could provide for herself and support the children.

was not considered sufficient to warrant a holding that the entire amount was taxable to the wife and deductible by the husband, in the face of other provisions in which the parties, as here, provided for an allocation of a fixed sum for the support of their children.[7]

The taxpayer places much emphasis upon a dictum in *Weil* v. *Commissioner*, 240 F. 2d 584 (C.A. 2d), certiorari denied May 13, 1957, to the effect that a husband can deduct all periodic payments where there is an "intention to make payments to the wife and have her support the children". But this statement is taken out of context and so taken completely ignores the crucial inquiry under the statute, *viz.*, whether the terms of the decree or agreement at issue, when read as a whole, fix a sum allocable to the support of minor children. This is all the statute requires, and the fact that it is the wife who is to so apply the payments is completely beside the point. This is so, in addition to the reasons given *supra*, because that circumstance does not answer the statutory test of whether $62.50 of the $125 weekly payments was here fixed in the agreement as payable for child support.[8]

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[7] It is essential to note that the statute uses the word "payable" for the support of minor children. The word "payable" is defined as "Capable of being paid; suitable to be paid; * * *; justly due; legally enforceable." Black's Law Dictionary (Fourth ed.), p. 1285.

[8] Indeed, Section 22(k) of the 1939 Code provides that when there is a sum fixed as allocable for child support in a decree or written instrument, then where a periodic pay-

Actually, the *Weil* case is completely distinguishable on its facts from the case at bar. The agreement in that case did not provide for a reduction in fixed amounts of periodic payments in the case of the death or majority of the children. Indeed, the agreement there stated, in Article 13(j), that (p. 588):

> There shall be no revision in the payments herein provided for to be made to the Wife by reason of the death or majority of the children or either of them or by reason of the fact that they then no longer reside with the Wife * * *.

Except in the case of the wife's remarriage, the agreement in that case nowhere fixed a sum for reduction in payments in situations where the wife ceased to support the children. The Second Circuit ruled (p. 588) that a sum cannot be found as allocable to the support of children "if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children"—that in such case the wife has complete independent beneficial ownership in the whole of the periodic payment. That court was convinced (p. 588) that Article 13(j) of the *Weil* agreement overcame the provision found in the remarriage clause and conclusively indicated that the parties did not

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ment is less than the periodic payment required to be made, the amount actually paid is considered paid for the support of the children to the extent of the sum fixed as so payable in the decree or written instrument.

intend any portion of the payments for child support.[9]

In the agreement at bar, however, we find all that the Second Circuit said it could not find in the *Weil* agreement. Thus, we have an instrument which contemplates a *discontinuance* of a fixed amount of the periodic payments to the wife after she ceases to support the children, or where the husband is no longer obligated to support the children. Therefore, in accordance with the Second Circuit's view in the *Weil* case, the wife here did not have the independent beneficial interest that Mrs. Weil had. Additionally, the wife here is deprived of any independent interest in $62.50 of the $125 weekly payments, which, if she failed to devote to the support of the children, the taxpayer could deduct from the weekly payments and see directly to the children's support. Clearly, if the wife did not, for any period, support the children, she could not compel the taxpayer to make the full $125 weekly payments to her for that period. See *Mandel* v. *Commissioner*, 229 F. 2d 382 (C.A. 7th).

The taxpayer's arguments concede the fact that

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[9] From a reading of the principal holding in the *Weil* case, and from that opinion's agreement with the principle applied in the *Mandel* and *Budd* cases, *supra* (in both the *Mandel* (185 F.2d 50, 51) and *Budd* (7 T.C. 413, 415) cases there were specific provisions for reduction of the payments in the event of the death of a child), it is clear that the rule announced by the Second Circuit was that if, upon reading the agreement as a whole, there is a sum fixed as allocable to child support, then that sum is not deductible by the husband, but if a sum is not so fixed, then the husband can deduct all sums.

under the *Mandel* and *Budd* line of cases [10] the Tax Court here drew a permissible inference, but ask this Court to declare those cases in error. (Br. 22-26, 30.) Aside from the arguments we have thus far made, the taxpayer has completely ignored the fact that Congress has recognized those cases as stating the correct rule. The *Mandel* and *Budd* cases were decided in 1950 and 1947, respectively, and state the rule which has been applied repeatedly by the courts under Sections 22(k) and 23(u) of the 1939 Code since the enactment of those provisions in 1942. These subsections of Sections 22 and 23, respectively, were reenacted by Congress as Sections 71 and 215, respectively, of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Secs. 71 and 215, respectively), and, in connection with the issue here presented, were stated by Congress to be substantially the same as existing law (H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A20-A21, A62 (3 U.S.Cong. & Adm. News (1954) 4017, 4157, 4198); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 170-171, 221 (3 U.S. Cong. & Adm. News (1954) 4621, 4805, 4858)). Under the well-settled principle of statutory construction that reenactment of a statute without change or indicating disapproval of the uniform judicial construction which it has theretofore received is implied legislative approval of the prior construction,[11] Con-

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[10] *Mandel* v. *Commissioner*, 185 F. 2d 50 (C.A. 7th); *Budd* v. *Commissioner*, 177 F. 2d 198 (C.A. 6th).

[11] It is settled law that subsequent legislation may be considered to aid in the interpretation of prior legislation upon the same subject. *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277.

gress has agreed that the *Mandel* and *Budd* line of cases have properly applied the statutory provisions in question. *Missouri* v. *Ross*, 299 U. S. 72, 75; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479. See *Dist. of Columbia* v. *Murphy*, 314 U. S. 441, 449; *Manhattan Prop.* v. *Irving Tr. Co.*, 291 U. S. 320, 335-336.

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed.[12]

Respectfully submitted,

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AUGUST, 1957.

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[12] If this Court, however, should sustain the contention of the taxpayer, then the basis for the Tax Court's allowance to him of dependency credits for the children would disappear, and the case should be remanded to the Tax Court to make the proper adjustments.

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